COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-138

COMMONWEALTH

vs.

ROBERT CHERRY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant was convicted of breaking and entering in the daytime with the intent to commit a felony, larceny of property valued over $250, vandalizing property, defacement of real or personal property, and breaking into a depository. After trial, the defendant pleaded guilty to being a habitual offender. On appeal, the defendant claims that the motion judge erred in denying his motion to suppress, and that there was insufficient evidence to support his convictions. We affirm.

1. Motion to suppress. The defendant claims that his roadside detention was tantamount to an arrest due its lengthy, unjustified duration; his custodial interrogation required Miranda warnings; his shoes were improperly seized without a

warrant; and his arrest was not supported by probable cause. We disagree.

"Under art. 14 of the Massachusetts Declaration of Rights, the touchstone of our analysis of police conduct that results in a search or seizure is whether that conduct was reasonable." Commonwealth v. Watts, 74 Mass. App. Ct. 514, 517 (2009). See Commonwealth v. Anderson, 406 Mass. 343, 346 (1989). The reasonableness of the particular conduct at issue here involves an evaluation whether the police exceeded the permissible scope of the stop, which is an issue of proportion. Commonwealth v. Sinforoso, 434 Mass. 320, 323 (2001). "The degree of suspicion the police reasonably harbor must be proportional to the level of intrusiveness of the police conduct." Id., quoting Commonwealth v. Williams, 422 Mass. 111, 116 (1996). "Several factors must be considered in determining whether the scope of the seizure was justified, including the length of the encounter, the nature of the inquiry, the possibility of flight, and the danger to the safety of the officers." Williams, supra at 118.

Here, the defendant does not claim any impropriety in the initial stop, exit order, or patfrisk of his person. However, in his brief, he claims that he was detained for more than sixty minutes. In large part, he relies on trial testimony to support his suggested timeline, which in this case is not appropriate.

See Commonwealth v. Grandison, 433 Mass. 135, 137 (2001). Although the motion judge made no finding on the length of the detention, at the evidentiary hearing, Officer Colman testified[1] that he held the defendant at the scene of the stop for forty-five minutes before Detective Corazzini arrived at the scene.

Prior to his detention, the defendant was at the scene of the burglary retrieving his motorcycle that was parked in the driveway of the victim's house. He left the scene before he could be stopped. At the scene of the stop, when the defendant was apprised that he was being detained due to the burglary investigation, he stated, "Don't do that business anymore. I'm retired." During the detention, while the defendant's hands were handcuffed in front of him,[2] the police also discovered that his criminal record contained 107 entries, including twenty entries for breaking and entering. See Roe v. Attorney Gen., 434 Mass. 418, 442 (2001) ("A person's prior criminal record is a legitimate factor to consider in determining whether there is reasonable suspicion for a stop").

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[1] The motion judge implicitly credited in full Colman's testimony.

[2] The fact that the defendant was handcuffed is not dispositive on the question whether he was under arrest. See Williams, 422 Mass. at 118. The police could reasonably have concluded that the defendant had fled the scene of the crime and that there was a continuing risk that he would attempt to flee again while Colman was by himself with the defendant. See Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 557 (2015). Cf. Commonwealth v. Phillips, 452 Mass. 617, 627 (2008).

Against this backdrop, we share the motion judge's conclusion that the police acted reasonably and proportionately to the unfolding circumstances. While the defendant was being detained, Corazzini quickly inspected the footprints (for ten minutes) at the victim's house. He then went immediately to where the defendant was being held to question him. It was permissible for the police to hold the defendant until the more experienced Corazzini, who had examined the footprints in the house, was able to speak with the defendant. The police acted diligently to confirm or dispel their suspicion that the defendant was responsible for the burglary. There was no evidence of any unnecessary delay in carrying out the investigation while the defendant was being held. The motion to suppress was properly denied on this ground. See Sinforoso, 434 Mass. at 325.

The defendant also claims that the motion judge erred in denying the motion to suppress where the defendant was subjected to custodial interrogation at the scene without the benefit of Miranda warnings. We disagree.

As the motion judge found, "the defendant's questioning took place in a non-coercive environment, as it occurred while the defendant was sitting on a sidewalk. . . . Further, although at the time of questioning Corazzini considered the defendant to be a suspect, and communicated his belief to the

defendant by telling him that his sneakers matched the footprint in the bedroom before questioning him, the questioning was 'generally of a fact-finding nature, intended to verify or dispel a reasonable suspicion of criminal activity, for which Miranda warnings are not required.'" Commonwealth v. Kirwan, 448 Mass. 304, 311 (2007). Indeed, Corazzini's questions were not directed to the crime, but were merely follow-up questions from the defendant's earlier statement to Sergeant Barry. Furthermore, as the motion judge found, Corazzini made no threats and his questions were not accusatory, and questioning ceased when the defendant invoked his rights.

Finally, as the motion judge properly noted, even though a reasonable person in the defendant's position would not have necessarily felt free to leave, the circumstances surrounding the questioning "did not demonstrate an environment so dominated by the police that a reasonable person would perceive that his liberty was restrained to a degree associated with a formal arrest." Id. at 312. See Commonwealth v. Groome, 435 Mass. 201, 211-212 (2001). In the end, the motion judge properly determined that the defendant failed to meet his burden to prove that he was in custody while he was questioned at roadside.

The defendant also claims, despite the motion judge's factual finding to the contrary, that the soles of his shoes were not in plain view for Corazzini to observe during the

defendant's detention. More specifically, the defendant claims the tread pattern on his shoes was not in plain view because Corazzini asked him to change the position of his feet when he arrived at the scene. We disagree.

Evidence may be seized without a warrant under the plain view doctrine. Commonwealth v. Balicki, 436 Mass. 1, 8 (2002). The doctrine applies "(1) where the police are lawfully in a position to view the object; (2) where the police have a lawful right of access to the object; and (3) in cases concerning (a) contraband, weapons, or other items illegally possessed, where the incriminating character of the object is immediately apparent; or (b) other types of evidence (mere evidence), where the particular evidence is plausibly related to criminal activity of which the police are already aware" (citations omitted). Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 306-307 (2010).

There is no question, and the defendant does not claim otherwise, that Corazzini was lawfully in a position to view the defendant's shoes. What the defendant does claim is that it was improper for Corazzini to have the defendant change the position of his feet to facilitate a better view of the soles. However, as the motion judge found, "Corazzini did not ask the defendant to lift his feet or display his sneakers but observed from the way he (the defendant) was positioned." Contrary to the

defendant's claim, this finding is properly supported by the record. At the suppression hearing, Corazzini testified on cross-examination by the defendant that he "got a good look at [the soles of the shoes] when [the defendant] was [seated] on the curb and made [his] observation then." Corazzini also agreed with the defendant's question that Corazzini had made his visual comparison of the footprints he had seen in the victim's house with what he saw "while the defendant was sitting down on the curb." On redirect, Corazzini explained that, based on how the defendant was seated on the curb, the bottoms of his shoes were visible. It was only after this point, when Corazzini had already concluded that the defendant's shoes matched the footprints at the house, did he ask the defendant to hold his foot up for an additional inspection. The motion judge's finding was not clearly erroneous.

The defendant also claims that because Corazzini's purpose in going to the scene of the stop was to view the defendant's shoes, what he discovered was not accomplished inadvertently. We disagree. Although this claim seems plausible, it is based on a misunderstanding of the inadvertency requirement. That is, although evidence in plain view must be discovered inadvertently, that requirement "means only that the police lacked probable cause to believe, prior to the search, that specific items would be discovered during the search." Balicki,

436 Mass. at 10. Moreover, "[t]he anticipation of finding some additional contraband or other evidence of criminality is not the same as having probable cause to believe that specific items of evidence will be present at the location to be searched. Such generalized anticipation undoubtedly exists in conjunction with almost every search, and to conclude that its presence negates inadvertence would stretch that requirement beyond its intent and limited purpose." Id. at 14. Here, of course, at the time of the stop, the police did not have probable cause to seize the defendant's shoes -- even if they expected there to be a match -- until Corazzini was able to make the actual visual comparison. But once Corazzini decided it was a match, the police had probable cause to arrest the defendant and to lawfully seize his shoes as evidence, and not as part of an inventory search as the defendant suggests. See Commonwealth v. Freiberg, 405 Mass. 282, 299 (1989); Commonwealth v. Blake, 23 Mass. App. Ct. 456, 463-464 (1987).

2. Sufficiency of the evidence. The defendant does not dispute the occurrence of any of the crimes of which he was convicted. Instead, he claims there was insufficient evidence to identify him as the perpetrator of those crimes. We disagree.

The defendant properly notes that there was an absence of direct evidence identifying him as the burglar. However,

"[c]ircumstantial evidence is competent to establish guilt beyond a reasonable doubt." Commonwealth v. Murphy, 70 Mass. App. Ct. 774, 777 (2007), quoting Commonwealth v. Merola, 405 Mass. 529, 533 (1989). Also, inferences drawn from circumstantial evidence "need only be reasonable and possible; [they] need not be necessary or inescapable." Murphy, supra, quoting Commonwealth v. Beckett, 373 Mass. 329, 341 (1977). See Commonwealth v. Casale, 381 Mass. 167, 173 (1980).

In the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), the evidence established that shortly after the burglary occurred and the police responded, the defendant arrived on the scene to retrieve his motorcycle that he had parked in the victim's driveway. The defendant had come from the direction where the stolen goods and a screwdriver had been left.[3] As he left the scene, the defendant asked the victim's child (who had been in the house during the burglary), "Are you okay?" from which the jury could infer his knowledge of the burglary. The jury were

[3] There is no merit to the defendant's claim that the timeline posited by the Commonwealth was "impossible." The jury were free to infer from these facts that the defendant was capable of traveling the short distance of 590 feet, dropping the stolen goods at a strip mall, and heading back to his motorcycle from the time the victim arrived home until the defendant's appearance at the scene. To the extent there exists conflicting inferences, such conflicts do not render the evidence insufficient as "it is for the jury to determine where the truth lies." Commonwealth v. Bennett, 424 Mass. 64, 68 (1997). See Commonwealth v. Amazeen, 375 Mass. 73, 81 (1978).

also free to discredit the defendant's statements as to why he was at the scene or even to view his conflicting explanations as consciousness of guilt. Finally, and most importantly, the Commonwealth provided the jury with the defendant's shoes and photographs of the footprints left in the white powder at the scene. The jury were free to evaluate and compare the exhibits and conclude that the defendant's shoes matched the impressions left at the scene at the time of the burglary. All this evidence, and the fair inferences drawn therefrom, provided ample evidence to support the jury's rational conclusion that the defendant burglarized the victim's house, broke into the safe, vandalized the house, and stole the jewelry.

Judgments affirmed.

By the Court (Meade, Agnes & Henry, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: August 15, 2019.

[4] The panelists are listed in order of seniority.